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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-285

ALPHA CHI OMEGA, ET AL., *Petitioners,*

v.

JOHN C. RADER, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent files this brief in response to the Court's request that he do so.

Briefly stated, it is respondent's position that the petition presents no question warranting review by this Court. The decision of the Seventh Circuit is eminently correct and is not alleged to be in conflict with any decision of this Court or of any sister Circuit. And the actual question presented (Pet. p. 2) is drained of all significance when viewed in light of prior decisions of this Court. More particularly:

I.

The question posed in this case is whether an F.T.C. proceeding brought pursuant to § 5 of the F.T.C. Act qualifies as a proceeding "to prevent, restrain or punish violations of any of the antitrust laws" within the meaning of § 5(b) of the Clayton Act so as to suspend the limitations statute applicable to private antitrust treble damage actions.

Petitioner has presented that question, however, on the mistaken notion that a proceeding under § 5 of the F.T.C. Act concerns not antitrust violations but only "unfair methods of competition and unfair acts and practices" under the F.T.C. Act. Hence, it is said (Pet. p. 5), a proceeding under § 5 of the F.T.C. Act is not one "to prevent, restrain or punish violations of any of the antitrust laws"—which laws do not include § 5 of the F.T.C. Act. That analysis is patently erroneous.

In a long series of opinions, this Court has made it plain that the "unfair methods of competition" language in § 5 of the F.T.C. Act is a broad and flexible phrase that covers many things but "minimally . . . registers violations of the Clayton and Sherman Acts." *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 609 (1953); *Federal Trade Commission* v. *Keppel & Bro.,* 291 U.S. 304, 310-312 (1934); *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 691-693 (1949); *Federal Trade Commission* v. *Motion Picture Service Co.,* 344 U.S. 392, 394-395 (1952). In other words, as stated in the last cited opinion (344 U.S. at 394-395), § 5 is designed "to stop in their incipiency acts and practices which, when full blown, would violate those [Sherman and Clayton] Acts . . . *as well as to condemn as 'unfair methods of competition' existing violations of them.*" (Emphasis added.)

II.

It necessarily follows that a F.T.C. proceeding under this § 5 is a proceeding "to prevent, restrain or punish violations of any of the antitrust laws," as § 5(b) of the Clayton Act uses that language. The F.T.C. proceeding can encompass much more than antitrust violations but it "minimally" covers such violations. And it is part of the F.T.C.'s duty in such a proceeding to prevent and restrain both incipient and matured antitrust violations. That duty, of course, is shared with the Department of Justice and the federal district courts. *Federal Trade Commission* v. *Cement Institute,* 333 U.S. at 691.

The fact that § 5 of the F.T.C. Act is not itself an antitrust statute and that a § 5 proceeding is thus not instituted "under" an antitrust statute is irrelevant. What is significant is that Congress has authorized the F.T.C. to deal with violations of the Sherman and Clayton Acts in the course of a § 5 proceeding. "The Commission has jurisdiction to declare that conduct to restrain trade is an unfair method of competition even though the self-same conduct may also violate the Sherman Act." *Federal Trade Commission* v. *Cement Institute,* 333 U.S. at 693.

III.

Contrary to petitioner's assertion (Pet. p. 5), the antecedent F.T.C. proceeding in this very instance dealt with alleged violations of the Sherman Act. As indicated in the recent opinion of the Seventh Circuit enforcing in large part the F.T.C. order, the F.T.C. was here concerned with charges of monopolization that were in substance violations of the Sherman Act. *L. G. Balfour Co.* v. *F.T.C.,* 442 F. 2d 1 (7th Cir. 1971). And

the Seventh Circuit premised its review of the F.T.C.'s monopolization findings "on an examination of criteria which constitute an offense under Section 2 of the Sherman Act." 442 F. 2d at 9. The F.T.C. proceeding is a classic example of one brought under § 5 of the F.T.C. Act, with its broad and flexible "unfair methods of competition" standard, that involved *inter alia* preventing and restraining violations of the Sherman Act.

It follows that such a proceeding fully meets the definition set forth in § 5(b) of the Clayton Act. It was a proceeding "to prevent, restrain or punish violations of any of the antitrust laws."

IV.

It need only be added that the asserted conflict between the Seventh Circuit's decision in this case and the decisions of two federal district courts in Louisiana and Pennsylvania (Pet. p. 5) does not qualify as a reason for the grant of certiorari. And the Seventh Circuit's reliance on a contrary decision of a federal district court in Vermont (Pet. p. 6) has no certiorari significance.

The petitioner errs in asserting (Pet. pp. 4, 6) that the Seventh Circuit gave "an unwarranted extension" to the holding of this Court in the 3M case, *Minnesota Mining Co.* v. *N. J. Wood Co.*, 381 U.S. 311 (1965), and that the Seventh Circuit's reliance on the 3M decision was "misplaced." A mere glance at the Seventh Circuit's opinion, now reported at 440 F. 2d 469, reveals that the court was fully cognizant of the narrow point in issue in the 3M decision (see Pet. A-2), which was whether an F.T.C. proceeding under § 5 is a "civil or criminal proceeding . . . instituted by the United States." The Seventh Circuit's reliance on the 3M deci-

sion was only with respect to the broad policy considerations there set forth respecting a liberal interpretation of the tolling provisions of the limitations statute applicable to private antitrust litigation (see Pet. A-5). Such reliance was well placed, not misplaced.

CONCLUSION

Since the decision below is so plainly correct and since no conflict exists with respect to decisions of this Court or of other Circuits, the petition for certiorari should be denied.

Respectfully submitted,

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